No. 3154.

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit.

UNION LAND AND STOCK COMPANY, a Corporation,

*Appellant,*

vs.

THE UNITED STATES OF AMERICA,

*Appellee.*

# APPELLEE'S BRIEF.

Upon Appeal from the Northern Division of the United States District Court for the Northern District of California, First Division.



ANNETTE ABBOTT ADAMS,
United States Attorney.

FRANK M. SILVA,
Asst. United States Attorney,
*Attorneys for Appellee.*

H. P. DECHANT,
Of Counsel.

No. 3154.

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit.

UNION LAND AND STOCK COMPANY, a Corporation,
*Appellant,*

vs.

THE UNITED STATES OF AMERICA,
*Appellee.*

## APPELLEE'S BRIEF.

### Statement of the Case.

This is a suit in equity by appellee to have declared forfeited a right of way and easement for the storage of water.

It is alleged in the bill of complaint that on November 18, 1895, and for a long time prior thereto, the plaintiff was the owner in fee simple, of part of its public domain, of the following described lands in the Susanville, California, Land District to wit: Sections 15, 16, 21, 22 and 23 of Township 36 North, Range 16 East, M. D. M.

That on February 23, 1895, the defendant, under the provisions of the Act of Congress of March 3, 1891, Chapter 561, entitled, "An Act to Repeal Timber Culture Laws and for other purposes," filed in said Land Office at Susanville its application for an easement for a reservoir for irrigation purposes, under the provisions of the above entitled Act, in the form of a map or plat attached to the complaint and marked "Exhibit A"; that said easement for said reservoir was described upon said map or plat as Reservoir No. 1 or Lake Luckett and covered and affected certain portions of the lands described in said complaint.

That on the 18th day of November, 1895, the said application for an easement for a reservoir was duly approved by the Secretary of the Interior.

The complaint further alleges that no part of said reservoir or section thereof has been constructed or completed by the defendant or its agents since the approval of said right of way by the Secretary of the Interior. A motion to dismiss the bill was made by the appellant on the ground that the bill did not state sufficient facts to constitute a valid cause of action in equity. This motion was denied by the lower court and thereupon, the appellant filed its answer, which in brief, was as follows:

It denies that on the 18th day of November, 1895, or for a long time prior thereto, the plaintiff was the

owner in fee simple or otherwise of the lands described and alleges that on said date and for a long time prior thereto, the defendant was and had been and now is the owner of certain portions of the lands described in the complaint.

Defendant admits the allegations of the complaint with reference to their application for an easement and the approval thereof by the Secretary of the Interior, but denies that the reservoir has been constructed or completed, as set forth in the complaint.

The Court gave a decree for the plaintiff and the defendant has appealed. At the trial the following stipulation was entered into, to wit:

"STIPULATION RE CONSTRUCTION WORK ON RESERVOIR, ETC.

> It was stipulated in open court by counsel for the respective parties that the following construction work had been done on the reservoir involved in this action and described in the said bill of complaint, and none other, to wit:
>
> That in the years 1894 and 1895, the Union Land and Stock Company, defendant herein, went on the ground at the point indicated on said map attached to said bill of complaint as Exhibit "A," and constructed a dam which at that time was 35 feet high; that this construction was finished some time in 1895, after the month of November; that said dam remained at that height until the winter of 1897-1898, when a portion of it was washed away; that in the fall of 1898 said dam was reconstructed to a height

of 26 feet, but settled down to a height at its lowest point of 23 feet, at which point it remained and now remains; that said dam has 300 feet of 30-inch steel pipe through the bottom, with a patent gate in shape to store and withdraw water.

It was also shown by competent evidence that the dam as constructed would not store water over more than 100 acres of the land in said reservoir, and that it did not have a capacity of more than 600 acre-feet of water; that the dam was in bad state of repair, but that it was strong enough to store water in the reservoir to a depth of 20 feet; that the base was not of sufficient width to build the dam to a height of 50 feet; that the said reservoir is one of a series of reservoirs, the others being known as dams Nos. 2 and 3, and that they are all used in connection with each other; that reservoir No. 1, being the one in suit, has been mainly used for the irrigation of what is known as the "Moulton Ranch," under a verbal agreement with the owners of said ranch; that the defendant company had been properly notified and cited to relinquish said reservoir site or show cause why judicial proceedings should not be instituted to cancel the grant, for the reason that the dam had not been built in accordance with the application as shown on Exhibit "A," attached to the complaint; that the defendant had had 20 years in which to complete said dam in accordance with said plans; that said reservoir has been used to store water each year since its construction, with the exception of dry years when there was no water to store.

### STIPULATION RE ARTICLES OF INCORPORATION OF UNION LAND AND STOCK CO.

> It was further stipulated that the articles of incorporation of Union Land and Stock Company, defendant herein, together with due proofs of its organization were filed in the office of the Secretary of the Interior, through the United States Land Office, in connection with its maps and plans, not later than February, 1895, and that on February 23, 1895, the map marked Exhibit "A" was filed in the local Land Office at Susanville, Cal., which map was approved by the Secretary of the Interior on November 18, 1895. The above and foregoing was all the evidence introduced at the trial of said cause."

The foregoing sets forth the record upon which the cause was decided in the lower court and from which it is to be determined whether the decree given in the lower court shall be affirmed or reversed.

## ARGUMENT.

It will be necessary to maintain in this suit, contrary to appellant's position, that the bill of complaint stated sufficient facts to constitute a valid cause of action in equity; that a suit for forfeiture has been and is authorized by the Congress of the United States; that the Attorney General has the authority to prosecute it and the Court to entertain it; that the Court did not err in holding all of the rights of appellant in the reservoir site involved

in this suit were cancelled. We seek now to establish these propositions by a consideration of the following.

## Points and Authorities.

### I.

### THE BILL OF COMPLAINT STATED SUFFICIENT FACTS TO CONSTITUTE A VALID CAUSE OF ACTION IN EQUITY.

Appellant takes the position that the bill is insufficient because of the fourth allegation thereof, which is as follows: "That no part of said reservoir or section thereof has been constructed or completed by said defendant or its agent *since the approval of said right of way by the Secretary of the Interior.*" Appellant contends that it would have been perfectly legal and proper for it to have entered the lands in question and constructed the reservoir without reference to any applicatin to the Secretary of the Interior at all provided, only that it should either *before* or *after* such construction file its articles of incorporation and due proof of its organization with the Secretary of the Interior. In other words, appellant maintains that construction and completion could have occurred prior to the approval of the Secretary. This may be true, but the fallacy in appellant's argument lies in the fact that appellant directs attention solely to this allegation of the bill.

We maintain and believe the proposition to be so elementary that citation of authority is unnecessary, that in passing upon the sufficiency of the bill the Court will view the whole bill in determining whether or not it states a cause of action. The Court will look at the "four corners of the bill" in passing upon that question.

We submit, therefore, that an examination of the bill in its entirety will disclose a valid cause of complaint in equity. The first allegation in the bill is (Tr. 4) that "On November 18, 1895, and *for a long time prior thereto,* plaintiff was the owner in *fee simple* as part of its public domain" of the lands in question.

The second allegation is (Tr. 4) that "On the 23d day of February, 1895, the defendant, under the provisions of the Act of Congress of March 3, 1891, Chapter 561, (26 Stat. 1101) entitled "An Act to repeal the Timber Culture Laws and for other purposes," filed in the United States land office at Susanville, California, its application for an easement for a reservoir for irrigation purposes under the provisions of Sections 18, 19, 20 and 21 of the above entitled Act, in the form of a map or plat, hereto attached and marked Exhibit "A," and made a part of this Bill of Complaint.

The third allegation of the bill is (Tr. 4) that "on said 18th day of November, 1895, the said application for an easement for a reservoir described on said map in accordance with the above entitled Act was duly approved by the Secretary of the Interior, subject to any valid rights existing on that date."

Exhibit "A," attached to the bill of complant, is not set forth in the transcript, and the said transcript having been prepared on appellant's application, it is fair to presume that the contents of said Exhibit "A" are unfavorable to this contention of appellant. It is elementary that when a fact or proof is within the possession of a party and is not produced, that the presumption is, *if* produced, it would be against the party so failing to produce it. The transcript (pgs. 5 and 6) shows that Exhibit "A" *calls* for a reservoir site covering approximately 469 acres, with a dam at the outlet thereof 50 feet in height, a base width of 270 feet, length on top of 230 feet, and a length on the bottom of 80 feet, calculated to store *when completed,* water over the entire acreage of said reservoir. It is to be noted from this description of Exhibit "A," that it *calls* for a certain described reservoir, *when* completed, to cover a certain area and to have a certain capacity.

The allegation of the bill is that this map was filed on February 23, 1895, and how appellant can claim that an inference can be drawn from the bill that

the reservoir was constructed and completed prior to the approval of the Secretary of the Interior is beyond us. It seems to us the allegations of the bill disclose that it was physically impossible for the reservoir to have been constructed and completed prior to the approval of the Secretary of the Interior. If the reservoir was constructed and completed prior to the application, why should appellant's map show what the capacity of the reservoir was to be *when completed.* This alone, shows the reservoir *was not* completed when the application was filed and taken with the further allegation in the bill that said reservoir has not been constructed or completed since the approval by the Secretary of the Interior, gives us sufficient allegations to make out a valid cause of action in equity.

Furthermore, the bill taken as a whole, discloses that the title to the land in question was in the United States of America in fee simple on the 18th day of November, 1895, and for *a long time prior thereto.* Now, if title was in the Government on said date, and for a long time prior thereto, it would be impossible as a legal proposition, for appellant to have constructed or completed its reservoir. If appellant had constructed and completed its reservoir prior to the approval of the Secretary of the Interior, then appellee would have had no legal or equitable right

to allege in the bill of complaint that it was the owner "in fee simple of the lands in question."

See *U. S. vs. Rockey Land & Cattle Co.*, 164 Fed. 496.

Counsel argued that the grants under the Act in question are grants in "praesenti." If this is true, and appellant had constructed or completed its reservoir prior to the approval of the Secretary of the Interior, appellee would not have been as alleged in the bill, the owner in fee simple of the lands in question.

Aside from all this, it must be remembered that the Government would have a cause of action if no work was done prior to the approval of the Secretary of the Interior. On the other hand, if appellant had constructed and completed its reservoir prior to the said approval, it would have a perfect defense to this suit. The Government has to show a failure of construction and completion prior to the approval, or a failure of construction and completion subsequent to the approval. If in point of fact, the appellant had constructed and completed in this case *prior* to approval this would constitute a matter of defense to the cause of action set forth in the bill.

Being a defense, the Government had no right under the rules of equity pleading to anticipate such defense in this bill. The same would have amounted

to mere surplusage and would have been subject to a motion to strike out. It is a well known rule of pleading that a negation of a defense in the bill is out of place and not to be tolerated. Complainant must state exclusively matters setting forth a cause of action, and is not permitted to anticipate a defense. This question has been passed on many times, and the following cases give clear expression to the rule against the anticipation of a defense:

*Boston vs. Montana,* 188 U. S. 632.

*Joy vs. St. Louis,* 201 U. S. 332.

*Louisville & Nashville Railway vs. Mottley,* 211 U. S. 149.

*In re Winn,* 213 U. S. 458.

*Denver vs. New York Trust Company,* 229 U. S. 123.

*Taylor vs. Anderson,* 234 U. S. 74.

*Little Rocks Water Works vs. Burnett,* 103 U. S. 516.

Some of the cases above cited are cases at law, but the principal contended for here seems to be well established both at law and in equity. Furthermore, under old equity rule 21 of the Federal Courts, the complainant could, at his option, anticipate a defense in his bill but that rule, while only giving an option or discretion to the complainant to so anticipate a defense, did not have for its purpose the promulgation of the principle that the complainant *must* an-

ticipate a defense. Said rule 21 has long since been abrogated, and now complainant has no right to anticipate a defense. We submit, therefore, that the bill here states a valid cause of action in equity.

## A SUIT FOR THE FORFEITURE OF APPELLANT'S GRANT IS AUTHORIZED BY THE CONGRESS OF THE UNITED STATES AND THE ATTORNEY GENERAL HAS THE AUTHORITY TO INSTITUTE AND PROSECUTE SUCH A SUIT.

The last sentence of Section 20 of the Act of March 3, 1891, hereinbefore referred to, is as follows: "Provided that if any section of said canal or ditch shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch or reservoir, to the extent that the same is not completed at the date of the forfeiture."

The facts here disclose that in this case more than twenty years had elapsed prior to the filing of the bill of complaint, and appellant had, during all that time, failed to complete its reservoir. Having failed to do so, the section quoted declares a forfeiture. The question then is, does this language of the statute give the Court the right and power to declare a forfeiture? We maintain that it does. We admit that there is a seeming conflict of authority in the

District Courts on this proposition, but we believe that a careful study of these decisions will clearly indicate a difference in fact and in law where they have decided in opposition to our contention. On the other hand, we believe that those sustaining our contention are directly in point here.

The case of the *United States vs. Washington Improvement Company*, 189 Fed. 674, decided by Judge Rudkin, July 15, 1911, and cited and relied upon by appellant, is not in point. In that case the Court was called upon and considered a special Act of Congress, which granted to the Improvement Company a right of way for its railway and its telegraph and telephone lines. The case having been based upon a special grant, it is fair to assume that it would, or at least, might be necessary for Congress to pass a special act of forfeiture for the violation of the granting act.

The various citations referred to in this decision all apply to special acts of Congress. We do not take it that the same rule would apply to a general Act of Congress. If such were the case, every time a breach of condition subsequent occurred under the general statute, Congress would have to pass an Act declaring a forfeiture, or Congress would have to pass an Act providing for forfeiture generally where violations of the granting act occurred. To do the

first would inflict upon Congress a never-ending task and reduce the situation to an absurdity. To do the latter, would be to attempt something already done, because the act itself provides for a forfeiture. The important business of Congress and the dignity of the law do not contemplate works of supererogation or the creation of absurd situations. Neither is it true that Congress must, every time its grantee violates a condition subsequent, declare more than *once* that his rights are forfeited. *Once* should be sufficient. Congress tells him in the granting act, that if he violates the terms of his grant, his rights stand forfeited. He accepts the grant with a clear and distinct understanding of what his rights and obligations are. He cannot accept the right without equally accepting the obligations it imposes. The forfeiture is there and the Courts are here to enforce it. The Attorney General is the agency of the Government which is authorized to put the machinery of the Courts into operation. This right of the Attorney General is so clearly made apparent in the Washington Improvement case cited supra, that reference to further authority is, we believe, unnecessary.

Another case decided February 10, 1919, by Judge Tripett, in the Southern District of California, is that of the *United States vs. Kern River Company.* This case also is adverse to our position. It is based

upon the decision of Judge Rudkin in the Washington Improvement Company case and gives no further or other reasons for the conclusions reached than are given by Judge Rudkin in the Washington Improvement case.

We trust that we are not unduly critical of the learned judges above referred to or that we are understood as intending that we are better able to pass upon the question here presented than are they. Such is not our purpose and such is not our belief. We do, however, consider it significant that neither of them has referred to the case of *Railroad vs. Mingus,* 165 U. S. 413; 41 Fed. 770. Our position is well stated in the Mingus case in this language of the Court: "But where the grant is a public one, this Court has held in a series of cases that the remedy of the Government is by an inquest of office or office found, a *judicial* proceeding but little used in this country, or by a legislative act directing the possession and appropriation of the land." (Italics ours).

The contention was made in the Mingus case that Congress had no right by a simple act to forfeit a title already vested without providing for judicial inquiry. The Court disposed of it as above noted.

On May 28, 1917, Judge Van Fleet, in an oral opinion, expressly overruled a motion to dismiss such as

was made here, and held that an express act of forfeiture or an act authorizing the suit was not necessary, and that the grant could be cancelled by a suit in equity.

In the case of *United States vs. Alpine Land and Reservoir Company,* decided by Judge Neterer, sitting in the Northern District of California, and in which he delivered an oral opinion, he held that a suit for forfeiture of the grant under the Act of March 3, 1891, could be maintained in a court of equity.

We believe that the case of *United States vs. Whitney,* 176 Fed. 593, is a well reasoned case and should have the consideration of this Court in determining the question under discussion. We take one quotation from this case, which we believe should be considered:

> "The act of March 3, 1891, is general and permanent in its character, and operates continuously to convey the title to public lands to all persons complying with its provisions. It cannot be doubted that the forfeiture clause equally with the granting clause is also in the nature of general law and of a permanent character, and that being true, it is not clear why it should not be held to be ample warrant to the Attorney General to enter the Courts and there seek the enforcement of public rights and the restoration of the title to public property, thus 'executing the law.' By the Constitution it is made the duty of the chief executive to 'take care that the laws be faithfully executed'; and, if certain

> rights are granted by general law, and by the same general law it is provided that such rights shall be forfeited on the breach of certain conditions, the breach existing, it is thought that the executive has the authority to institute proceedings in the courts to have such forfeiture judicially declared and that suits brought for that purpose are judicial proceedings authorized by law."

Other cases which are at least analagous to this one, which throw considerable light upon this subject and are in harmony with our views are: *Rio Grande Dam, etc., Company vs. United States,* 215 U. S. 266; *United States vs. Bernard,* 203 Fed. 728.

Hence we maintain that the Act of March 3, 1891, confers jurisdiction on a Court of Equity to declare a forfeiture under the circumstances disclosed by this record.

## III

## THE COURT HAD AUTHORITY TO HOLD ALL OF APLELLANT'S RIGHTS WERE CANCELLED BY REASON OF ITS FAILURE TO CONSTRUCT AND COMPLETE THE RESERVOIR IN QUESTION.

Section 20, the Act in question, provides that forfeiture shall occur as to any uncompleted section of a canal, ditch or reservoir, to the extent that the same is not completed at the date of the forfeiture.

Appellant claims that a section of the reservoir was completed and hence no forfeiture can be declared as to the portion or section so completed. Let us look at the record.

According to the transcript (Tr. 5 and 6) Exhibit "A," called for a reservoir site covering approximately 469 acres, with a dam at the outlet thereof 50 feet in height, base width of 270 feet, a length on top of 230 feet and a length on the bottom of 80 feet, calculated to store water over the entire acreage of said reservoir. These specifications show that but one reservoir site was contemplated by appellant. Appellant claims that the project was to consist of a series of reservoirs. This is done in order that it can be claimed that a section thereof was completed. Assuming this to be true, we are confronted with this situation, that the reservoir involved in this suit is a *section* of the series of appellant's reservoirs that remains and is uncompleted, and hence forfeiture should go to the entire reservoir described in this suit.

It clearly appears from the evidence in this case (Tr. 10) that the reservoir in this case was never completed; that it was less in height, capacity and base than the one called for; that the base of the dam was insufficient to ever permit the project being completed to a height of 50 feet. Under these circum-

stances we maintain that a section of the project, to wit, the reservoir in this suit, described, remains uncompleted, and the law says that the grant shall be forfeited as to any uncompleted section of such reservoir.

The reservoir, in suit, was a separate, distinct and entire section, irrespective of all others, and the undisputed testimony is that this section, i. e. this reservoir is uncompleted. If this were not the law, then any designing person or corporation could make application under the Act in question, erect any kind of a dam or reservoir other than the one contemplated, and thus keep from the public use and benefit valuable sites for reservoir purposes. The public would then be made the victim of designing persons, and the very object of the law frustrated, and the law itself rendered nugatory.

In our opinion, this law was passed to encourage and promote irrigation and to throw open for irrigation purposes all available land owned by the Government. To say then that any one can represent to the Government that he wants lands for irrigation purposes and will construct thereon certain specified reservoir, and then be permitted to block the entire scheme or purpose of the Act by permitting his project to remain uncompleted, by leaving one reservoir in his series

less in height, capacity and base than what was called for, is to say that the law is meaningless. He must live up to the terms of his grant. If he fails to complete any section he must forfeit that section, no matter how near completion it may be. Others may stand ready and willing to build dams and reservoirs that will develop the fullest measure of irrigation. Then, certainly, the law must mean that when it appears as it does here, that one of the reservoirs is a separate section in itself and remains uncompleted, that all rights to it are forfeited.

## CONCLUSION.

We maintain, therefore, that the bill of complaint is sufficient; that such a suit is authorized by law; that the Attorney General has authority to institute it and that upon the proofs adduced, it is apparent that all of appellant's rights in the property described in the complaint stand forfeited.

We submit, therefore, that the judgment of the lower Court should be affirmed.

ANNETTE ABBOTT ADAMS,
United States Attorney,

FRANK M. SILVA,
Asst. United States Attorney,
*Attorneys for Appellee.*

H. P. DECHANT,
Asst. Solicitor of the Department of Agriculture,
*Of Counsel.*